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No. 79-392

In the Supreme Court of the United States

OCTOBER TERM, 1979

MARION H. MORRIS, ET AL., PETITIONERS

v.

MAJOR GENERAL WILLIAM T. MCCADDIN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinions of the court of appeals (Pet. App.1-2) and the district court (Pet. App. 13-16) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 10, 1979. A petition for rehearing was denied on June 11, 1979. The petition for a writ of certiorari was filed on September 7, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Air Defense technicians whose jobs were abolished, but who then successfully claimed that they were entitled to be reemployed in different positions,

are entitled to back pay and other retroactive employment benefits for the period between their termination as technicians and appointment to new positions.

STATUTE INVOLVED

The Back Pay Act, 5 U.S.C. 5596(b), provides in relevant part:

> An employee of an agency who, on the basis of an administrative determination or a timely appeal, is found by appropriate authority under applicable law or regulation to have undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or a part of the pay, allowances, or differentials of the employee—
>
> (1) is entitled, on correction of the personnel action, to receive for the period for which the personnel-action was in effect an amount equal to all or any part of the pay, allowances, or differentials, as applicable, that the employee normally would have earned during that period if the personnel action had not occurred, less any amounts earned by him through other employment during that period; and
>
> (2) for all purposes, is deemed to have performed service for the agency during that period * * *.

STATEMENT

1. On February 4, 1974, the Department of Defense announced that the Nike-Hercules Missile Program would be terminated on September 30, 1974. As a result, the jobs of 291 National Guard technicians employed at three Nike-Hercules missile sites in Virginia were to be abolished. Pursuant to the National Guard Technicians Act of 1968, 32 U.S.C. 709(e)(4), this reduction in force

was to be accomplished by the Adjutant General of the Virginia National Guard under regulations prescribed by the Secretary of the Army. The Secretary furnished the Virginia Adjutant General with a booklet entitled "Technician Personnel Pamphlet 910" [hereinafter "TPP 910"] for guidance in finding jobs for displaced technicians (Pet. App. 5). The Virginia Adjutant General concluded that the displaced technicians should not receive a preference in filling future vacancies in Virginia National Guard units. He determined that a merit promotion plan should be instituted instead because "the merit promotion plan would obviate morale problems with the remainder of the Virginia National Guard, and the Virginia National Guard would suffer less in the long run" (Pet. App. 6-7).

On October 11, 1974, several of the displaced technicians filed this lawsuit in the United States District Court for the Eastern District of Virginia, claiming that the failure to offer them reemployment in other state National Guard units violated TPP 910 (Pet. 3). The district court upheld the actions of the Virginia Adjutant General, concluding that (Pet. App. 32-33):

> [T]he merit promotion program was a sound one which lived up to the broad policy considerations embodied in TPP 910, and given the considerable discretion of the Adjutant General in conducting and planning reductions in force, we can find no abuse of that discretion.

The court of appeals reversed in part, holding that the Virginia National Guard was bound by the provisions of TPP 910, which required state guard units "to the fullest extent to give preferential treatment to those technicians faced with loss of their jobs" (Pet. App. 5; 553 F.2d 866).[1]

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[1]The district court had denied petitioners' motion to proceed as a class, and the court of appeals affirmed (Pet. App. 12).

The court of appeals directed the district court on remand to enter "an appropriate order directing the defendants to prepare a schedule, subject to the court's approval, offering employment or reemployment to plaintiffs at no less than the grade each would have had if the competition for vacancies had been restricted to the displaced technicians in accordance with TPP 910" (Pet. App. 11). The court held, however, that "the United States will not be required to pay plaintiffs for wages lost due to failure to receive jobs as they were entitled, nor will defendants be held individually liable" (*ibid.*).

Pursuant to the mandate of the court of appeals, the Virginia Adjutant General prepared and presented to the district court for its approval an employment and reemployment schedule.[2] The district court concluded that the schedule offered by the government conformed to the mandate of the court of appeals and, after the schedule was amended to take account of nine additional plaintiffs who were allowed to intervene, it was approved (Pet. App. 15-17). The court of appeals affirmed (Pet. App. 1-2).

ARGUMENT

Petitioners contend (Pet. 8) that they are entitled to a retroactive award of wages and other emoluments of employment under the Back Pay Act, 5 U.S.C. 5596(b),

[2]The vacancies were listed in descending order, as were the displaced technicians. These two lists were then combined so that the best (*i.e.*, highest grade and highest paying) vacancy could be offered to the best (*i.e.*, highest graded, highest paid, most senior) displaced technician. Petitioners' suggestion that this Court should reexamine the reemployment schedule (Pet. 11) is without merit. The schedule approved by both the district court and the court of appeals is well within the discretion of the Adjutant General under TPP 910. See *Orloff* v. *Willoughby*, 345 U.S. 83 (1953); *Cortright* v. *Resor*, 447 F. 2d 245 (2d Cir. 1971), cert. denied, 405 U.S. 965 (1972).

for the period between their termination as technicians with the Nike-Hercules Missile Program and their reemployment in other National Guard positions.[3] Petitioners argue that the refusal to award back pay in this case is in conflict with this Court's decision in *United States* v. *Testan*, 424 U.S. 392 (1976), and with decisions of other courts of appeals.

Petitioners' contention that they are entitled to back pay under 5 U.S.C. 5596(b) overlooks the fact that the statute applies to wrongful separation but does not apply to wrongful failures to appoint or wrongful failures to reclassify personnel to new job positions. *United States* v. *Testan, supra*, 424 U.S. at 402-405. In *Testan*, the Court held that the Back Pay Act was inapplicable in a case where the claimant contended that he had "been denied the benefit of a position to which he should have been, but was not, appointed." 424 U.S. at 402. The Court noted that "[t]he established rule is that one is not entitled to the benefit of a position until he has been duly appointed to it. *United States* v. *McLean*, 95 U.S. 750 (1878); *Ganse* v. *United States*, 180 Ct. Cl. 183, 186, 376 F. 2d 900, 902 (1967)." 424 U.S. at 402. Because petitioners' claims in this case are based upon an alleged entitlement to an appointment to new positions, and not upon a wrongful discharge from their prior positions as Nike-Hercules missile technicians, they are not entitled to back pay under 5 U.S.C. 5596(b).

[3]It is not evident from the petition whether any of the 27 petitioners actually lost pay or emoluments due to the fact that the employment offered pursuant to the order of the court was not offered earlier. If not, they would lack standing to raise their claim at this time.

The decision of the court of appeals is consistent with the decisions of other circuits following *Testan*. See, *e.g.*, *Donovan* v. *United States*, 580 F. 2d 1203 (3d Cir. 1978); *Hill* v. *United States*, 571 F. 2d 1098 (9th Cir. 1978).[4] There is thus no conflict among the circuits to warrant further review.

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[4]The Court of Claims' decisions on which petitioners rely (Pet. 8-9) were all decided without the benefit of this Court's decision in *Testan*. To the extent that they are inconsistent with *Testan*, they should not be followed. Indeed, one of the cases cited by petitioners (*Ainsworth* v. *United States*, 399 F.2d 176 (Ct. Cl. 1968)) was distinguished in *Testan*, where the Court stated (424 U.S. at 407):

> *Ainsworth* v. *United States*, 185 Ct. Cl. 110, 399 F. 2d 176 (1968) (cited by *amici*), involved the rights of an employee who had been discharged and subsequently reinstated.
>
> [*Ainsworth* does not provide] a reason for doubting that the Back Pay Act, as its words so clearly indicate, was intended to grant a monetary cause of action only to those who were subjected to a reduction in their duly appointed emoluments or position.

Petitioners' contention that they should be paid back wages under TPP 910 itself (Pet. 9 n.5) not only misconstrues that pamphlet but also overlooks the point that only Congress can waive sovereign immunity. See *United States* v. *Testan, supra*, 424 U.S. at 403:

> There is a difference between prospective reclassification, on the one hand, and retroactive reclassification resulting in money damages, on the other. See *Edelman* v. *Jordan*, 415 U.S. 651 (1974).

See also *Hill* v. *United States, supra*, 571 F. 2d at 1101. The case of *Chambers* v. *United States*, 451 F. 2d 1045 (Ct. Cl. 1971), relied upon by petitioners (Pet. 9 n.5), was distinguished in *Donovan* v. *United States, supra*, because it was decided "before *Testan* and under provisions other than the Back Pay Act * * *." 580 F. 2d at 1208 n.6.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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